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In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

PHILIP L. BORNSTEIN, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ROBERT H. BORK,
Solicitor General,
KEITH A. JONES,
Assistant to the Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a–17a), is not yet reported. The opinion of the district court (App. C, *infra*, pp. 20a–38a) is reported at 361 F. Supp. 869.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, pp. 18a–19a) was entered on September 4, 1974. On December 2, 1974, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to

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and including December 7, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a subcontractor who fraudulently causes its prime contractor to submit multiple false claims for payment to the United States in connection with a government contract is liable for multiple forfeitures under the False Claims Act.

2. Whether recoveries from the prime contractor for breach of contract reduce "the amount of damages the United States may have sustained by reason of the * * * [subcontractor's fraudulent] act[s]" for purpose of the Act's double-damages provision.

STATUTE INVOLVED

The False Claims Act, 12 Stat. 698, 31 U.S.C. 231, in pertinent part provides:

> Any person * * * [1] who shall make or cause to be made, or present or cause to be presented, for payment or approval, * * * any claim upon * * * the United States, or any department or officer thereof, knowing such claim to be false * * * or [2] who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or [3] who enters into any agreement, combination, or conspiracy to defraud the Government of the United States * * * by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim * * * shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act * * *.

STATEMENT

This case arises out of a government contract for the procurement of radio kit sets for the Department of the Army. Under the contract the prime contractor, Model Engineering and Manufacturing Corp., Inc. ("Model"), agreed to equip each of the kits with a specified type of electron tube bearing special markings to indicate that it had passed government inspection (App. C, *infra*, p. 21a, n. 2). Model entered into a subcontract with United National Labs ("United"), a corporation operated and managed by respondents, for the purchase of the necessary tubes.

Respondents, acting through United, knowingly furnished Model with falsely branded tubes that had not in fact been inspected by the government (App. C, *infra*, p. 24a). Model incorporated the tubes into radio kits and shipped the kits to the Department of the Army in 35 lots, each of which was covered by a separate claim for payment (App. C, *infra*, p. 26a). The Army paid Model with eight vouchers (*ibid.*).

The tubes were subsequently discovered to have been falsely branded, and the government expended $16,-

205.54 to replace them with tubes that conformed with the contract specifications (App. C, *infra*, p. 30a).[1] Model paid the government $16,165.84 in settlement of a contract claim based upon that expenditure (App. C, *infra*, pp. 27a-35a).[2]

The United States then brought this suit against respondents under the False Claims Act, requesting multiple $2,000 forfeitures and double damages. The district court found that respondents, "[b]y knowingly affixing or causing to be affixed false markings on the tubes and by certifying that all materials furnished conformed to the applicable specifications, * * * caused Model to present thirty-five claims for payment to the United States" (App. C, *infra*, p. 28a). The court determined that each of the 35 false claims for payment constituted a separate and complete violation of the Act and therefore that the United States was entitled to 35 forfeitures in the total amount of $70,000. However, the court reasoned that Model's payment had reduced the government's single damages to $39.70 for purposes of the Act, and therefore awarded double damages of only $79.40.

Respondents and the goverment both appealed. The court of appeals affirmed the award of only nominal double damages but reversed the award of multiple

[1] The shipments from Model contained a total of 442 falsely branded tubes, which the government replaced at a cost of $40.82 per tube. The district court found, however, that "[o]nly 397 of these tubes can be identified by serial number as having been supplied by [respondents]" (App. C, *infra*, p. 25a).

[2] Model paid the government $40.72 for each of the nonconforming tubes supplied pursuant to the contract (App. C, *infra*, p. 35a).

forfeitures. The court acknowledged that the literal language of the Act justifies the multiple forfeitures awarded by the district court and that in like circumstances multiple forfeitures were permitted by the Sixth Circuit in *United States* v. *Ueber*, 299 F. 2d 310.

The court nevertheless determined that the number of forfeitures should not be based upon the "fortuity" of the number of claims for payment actually submitted by the prime contractor. It therefore ruled that, in cases involving fraud by subcontractors, the number of forfeitures under the Act should be determined by reference to the number of subcontracts whose performance was affected by the subcontractor's fraud, and not by reference to the actual number of false claims submitted to the United States. Accordingly, the court reversed as to all but one of the forfeitures. The court concluded its opinion by noting that its decision conflicted with *Ueber* and observing (App. A, *infra*, p. 17a):

> Perhaps the Supreme Court will shed more light than we have been able to do. Any limiting interpretation of [the False Claims Act] involves arbitrary line drawing. This statute, we may add, cries out for congressional attention.

REASONS FOR GRANTING THE WRIT

The court of appeals' disallowance of multiple forfeitures directly conflicts with the decision of the Sixth Circuit in *United States* v. *Ueber*, *supra*, and appears to be inconsistent with this Court's construction of the False Claims Act in *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537. The decision below also

substantially impairs the effectiveness of the Act in deterring fraud by government subcontractors.

1. It is undisputed that the False Claims Act applies to false claims caused to be presented to the United States by government subcontractors. See, *e.g.*, *United States ex rel. Marcus* v. *Hess, supra; United States* v. *Rohleder,* 157 F. 2d 126 (C.A. 3). It also has been long established that, in cases of fraud by prime contractors, the number of forfeitures under the Act is determined by reference to the number of separate violations committed, not by reference to the number of contracts with respect to which false claims were made. See *United States* v. *National Wholesalers,* 236 F. 2d 944 (C.A. 9) (eight forfeitures arising from a single contract); *Faulk* v. *United States,* 198 F. 2d 169 (C.A. 5) (five forfeitures arising from one contract).

Reasoning from these decisions, the Sixth Circuit in *Ueber* correctly concluded that a subcontractor also is responsible for multiple forfeitures when its fraudulent misrepresentations result in the presentation by the prime contractor of multiple false claims to the United States. The court below refused to follow *Ueber* and rejected the logic of the earlier courts of appeals' decisions as well.

There is no basis in the statutory text for the court's disallowance of multiple forfeitures for a subcontractor's fraud. As this Court observed in the course of upholding 56 forfeitures in *United States ex rel. Marcus* v. *Hess, supra,* 317 U.S. at 552, the Act "requires that the $2,000 forfeit be paid for doing 'any' of the [prohibited] acts * * *." See, also, *Toepleman* v. *United States,* 263 F. 2d 697 (C.A. 4). In short,

each separate and complete violation of the Act "justif[ies] an assessment of a separate forfeiture." *United States* v. *Ueber, supra,* 299 F. 2d at 313. Each false claim that respondents caused Model to make represents a separate violation of the Act and therefore forms the basis for a separate $2,000 forfeiture.

Nor is the decision below supported by the underlying policies of the Act. As this Court has more than once noted, "the objective of Congress in enacting the False Claims Act 'was broadly to protect the funds and property of the government from fraudulent claims * * *'." *United States* v. *Neifert-White Co.,* 390 U.S. 228, 233. The decision below substantially defeats that objective by converting the forfeitures provision of the Act into little more than a $2,000 license for subcontractor fraud.

Although, as the court observed, respondents here could not control the number of false claims submitted by Model, they could reasonably have assumed that the radio kits would be shipped in separate lots and that multiple claims for payment would therefore be required. Thus the assessment of multiple forfeitures in such cases would involve no unfair surprise, and it would significantly enhance the deterrent effect of the Act.

2. The court's further holding that recoveries from Model for breach of contract reduce the "amount of damages which the United States may have sustained by reason of * * * [respondents' fraudulent] act[s]," within the meaning of the Act's double-damages provision, additionally weakens the Act's power to deter subcontractor fraud. Although there is no conflict yet

among the courts of appeals on this issue, it is a significant question under the Act that may be appropriately and conveniently considered together with the question of multiple forfeitures.

The court below erroneously read the Act's double-damages provision as if it permitted doubling only of the "amount of *uncompensated* damages which the United States may have sustained * * *." We see no basis in the language of the Act or its underlying policies for that reading.

The practical effect of the decision below may be to nullify the double-damages provision in cases involving subcontractor fraud. The normal first recourse in such cases is a claim against the prime contractor for ordinary contract damages; typically, as in this case, the contractor will have no valid defense to such a claim. Thus, where the contractor is solvent, by the time the subcontractor has been adjudged in violation of the Act the government in most cases will have recovered the losses occasioned by the fraud. We do not believe it appropriate to insulate the subcontractor, as the court below has done, from virtually any liability for the payment of statutory damages to the government in such circumstances merely because of the government's diligence in pursuing its contract remedies.

We believe the appropriate result in such circumstances to be an assessment against the subcontractor of double the amount of the government's pre-recovery damages, followed by the equitable allowance of a credit against the doubled damages in the amount

of the government's recoveries from the prime contractor. That result would preserve the deterrent effect of the double-damages provision while at the same time both preventing a government windfall and protecting the subcontractor (which presumably will be liable to the prime contractor for the amount of the latter's payment to the government) against liability (other than for forfeitures) in excess of double damages.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

ROBERT H. BORK,
Solicitor General.
KEITH A. JONES,
Assistant to the Solicitor General.
DECEMBER 1974.

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APPENDIX A

United States Court of Appeals For The Third Circuit

Nos. 73–1885/1886/1887

UNITED STATES OF AMERICA

v.

PHILIP L. BORNSTEIN, GERALD PAGE AND UNITED NATIONAL LABS, DIVISION OF SONORA ELECTROMATICS, INC.

PHILIP L. BORNSTEIN, APPELLANT IN No. 73–1885
UNITED STATES OF AMERICA, APPELLANT IN No. 73–1886
GERALD PAGE, APPELLANT IN No. 73–1887

On Appeal from the United States District Court for the District of New Jersey

Argued May 17, 1974 before SEITZ, *Chief Judge*, VAN DUSEN and GIBBONS, *Circuit Judges*

GIBBONS, C. J.

Appeals by the defendants and an appeal by the plaintiff United States of America bring before us for interpretation the False Claims Act. Act of March 2, 1863, Ch. 67, 12 Stat. 696, 698, 31 U.S.C. § 231. The United States on November 3, 1967 brought an action for double damages and forfeitures against defendants Philip L. Bornstein, Gerald Page, individuals, and United National Labs, Division of Sonora Electromatics, Inc., a New Jersey corporation. Bornstein and Page were officers and owners of that corporation, which by order of July 19, 1973 was dismissed as a

defendant. The individual defendants are referred to hereafter as "United." The case was tried to the district court on a stipulation of facts. On June 26, 1973 the district court filed an opinion[1] determining that judgment should be entered in favor of the United States and against United for double damages, in the sum of $79.40, and forfeitures in the sum of $70,000. A judgment was entered for $70,079.40 and costs. United appeals from the judgment awarding $70,000 in forfeitures. The United States appeals from the award of $79.40 in double damages.

I. THE FRAUDULENT SCHEME

In August 1962 the United States Signal Supply Agency entered into a supply contract with Model Engineering and Manufacturing Corporation, Inc. (Model) under which Model was to supply radio kit sets to the Army. Each radio kit was to contain two electron tubes designated "JAN type 4X150G per MIL E–1 specifications." "JAN" stands for Joint Army Navy qualification approval standard. Tubes may be "JAN" branded by the manufacturer only after they have passed government inspection at the place of manufacture during the manufacturing process. As proof of such source inspection the government inspector imprints his "Eagle" acceptance stamp on packing lists accompanying each shipment of tubes. He also affixes his signature to a written certification that the tubes have passed all the required tests, in this case those specified in MIL E–1. During the relevant time only authorized manufacturer of JAN type 4 x 150G tubes was Eitel McCullough, Inc. (Eimac). Although JAN type 4X150G tubes are manufactured to military specifications, surplus or obsolete tubes of that model are commercially

[1] *United States* v. *Bornstein*, 361 F. Supp. 869 (1973).

useable. On April 30, 1963 Arthur H. Richardson, Inc. (Richardson) a franchised distributor for Eimac, purchased 451 tubes, type 4X150G, from Eimac which had been placed in a termination inventory because of a design change, for $15.52 a tube. In May 1963 United wrote to Model that it could supply JAN type 4X150G tubes for $32.00 per tube. The market price for such tubes from Eitel's production was then $40.00. In July United purchased ten JAN type 4X150G tubes from Richardson and shipped them to Eitel for preliminary inspection. Model advised United respecting the ten sample tubes that they were electrically and physically acceptable, but had no code date and no JAN marking. In December 1963, Model issued to United a purchase order for 1008 JAN type 4X150G tubes at $32.00 a tube. United made an initial delivery of 120 tubes, which Model returned as unacceptable because they were not JAN labeled and had not been government source inspected. United assured Model it could deliver JAN tubes to fill the purchase order. It purchased 380 JAN type 4X150G tubes from Richardson for $17.50 each, and affixed on each tube the JAN designation, the manufacturer's qualification code, and the acceptance date. United then shipped each tube to Saxon Laboratories, Inc. (Saxon) for testing. At Saxon's plant the impression of a facsimile government inspector's "Eagle" stamp was affixed to twenty-one separate packing lists identifying each tube by serial number. The twenty-one packing lists covered twenty-one boxes, which included a total of 397 tubes. The stipulation does not disclose the source of the seven tubes in addition to the 390 acquired from Richardson. The twenty-one boxes were shipped to Model in three shipments. With each shipment United issued to Model a

"Certificate of Compliance" certifying that the parts complied with the specifications referred to in the purchase order. Model included the 397 tubes in its shipments to the Signal Supply Agency, and filed with the United States thirty-five invoices covering the entire contract price. The United States paid the thirty-five invoices.

Later the government learned that some 442 of the JAN type 4X150G tubes shipped by Model were falsely branded JAN. It replaced these tubes with JAN type 4X150G tubes which it purchased for $40.82 each or a total of $18,042.44. It then made a claim against Model. In November 1964 Model paid the United States $18,000 on account of the 442 falsely branded tubes. The government was able to trace 397 of the 442 tubes by serial number to United. The government retained the 397 tubes which have a commercial value not clearly established by the stipulation. The stipulation reflects no costs to the government other than $40.82 paid to replace the misbranded tubes.

II. THE DISTRICT COURT DECISION

The district court calculated the government's damages by multiplying the $40.82 replacement cost by 397, for a total of $16,205.54, and by deducting from that amount $16,165.84. The latter figure was calculated by dividing the $18,000 refund from Model by 442, the total number of falsely labeled tubes, or $40.72 a tube and multiplying $40.72 by 397. Thus the district court calculated the government's damage at ten cents a tube ($40.82–$40.72) or $39.70, and doubled that figure to $79.40.

The district court calculated the statutory forfeiture on the basis of a single $2,000 forfeiture for each of the 35 invoices submitted by Model to the United States for payment.

III. THE GOVERNMENT'S APPEAL

The government contends on appeal that the district court erred in calculating damages. It contends that the damage award should have been $32,411.08, which it calculates: 397 x $40.82=$16,205.54 and $16,205.54 x 2=$32,411.08. Since it is the plaintiff it had the burden of proving damages. Its claim is, in the words of the statute, for "double the amount of damages which the United States may have sustained by reason of the doing or committing such act." 31 U.S.C. § 231. Nowhere in its brief does it demonstrate the relationship between the figure of $16,205.54 and the amount of damages which it sustained. Rather it makes the disingenuous contention that the $18,000 refund by Model should be entirely omitted from the calculation of damages on the authority of the collateral source rule. This despite the fact that it stipulated:

> "In November, 1964, Model paid the United States $18,000 for the Government's claim relating to the payments of the 442 falsely branded JAN 4X150G tubes which are referred to in the Complaint. Appellants' [Bornstein and Page] Appendix at 16a.

To avoid the effect of its stipulation that it was refunded $40.72 for every tube, it asserts that the $18,000 payment should be disregarded entirely because it took the form of a setoff against funds due to Model on other contracts. The government's answers to interrogatories included in the stipulation, paragraph 25, establish that this form of payment resulted because Model was experiencing a shortage of working capital. In accepting Model's offer of an $18,000 setoff the Assistant Attorney General wrote:

> "Our claim against Model arose through the failure of that company to furnish electron tube type 4X150G to the Government in accordance

> with the specifications set forth in Contract No. DA-36-039-AMC-01080 (E) dated August 29, 1962, awarded by the United States Army Signal Supply Agency, Philadelphia, Pennsylvania. The *damages* were computed to total $18,042.44 based on the receipt by the Department of the Army of 442 non-conforming and surplus tubes." (emphasis added) Appellant's [Government] Appendix at A-5.

By some reasoning process which escapes us the government concludes that the *damages* referred to in the letter are different from the *damages* caused by United's false claim, even though in both instances they refer to 397 of the same tubes and to a replacement cost of $40.82 per tube. By similar logic the government could recover damages of $40.82 a tube from United had it never paid the Model invoices in the first place.

We do not suggest that in a claim for double damages under the False Claims Act the government's recovery is limited to the replacement cost of non-conforming materials. Nor need we decide in this case whether the ordinary contract rules of damages apply. The point is that the government was the plaintiff and had the burden of proving damages. It proved by stipulation no other element of damage to it than the $40.82 replacement cost of the tubes, for $40.72 of which it had been reimbursed by Model. Its proof of damages established no greater loss than 10 cents a tube. Nor do we suggest that had the claim against Model been for forfeitures under the False Claims Act the recovery of such forfeitures should be applied in reduction of the claim for damages against United. There is no suggestion in the stipulation that any claim for forfeitures was asserted against Model, or that the government even sought double rather than single damages from that source. In the record before

us the government stipulated that the Model payment was for damages simpliciter. We cannot at the appellate level disregard the record which the plaintiff made in the district court.

Alternatively the government contends that if the Model payment should be credited in reduction of its damage claim the credit should not have been applied to the single damage amount but to that amount doubled. In *United States* v. *Klein,* 230 F. Supp. 426 (W.D. Pa. 1964), *aff'd per curiam,* 356 F.2d 983 (3d Cir. 1966), the Veterans Administration was falsely induced to make insured loans. Certain amounts were received by the Veterans Administration after foreclosure of the properties in reduction of the loans. The district court applied these credits before doubling damages. We affirmed without opinion. The district court in the instant case followed *Klein.* The government relies on *United States* v. *Sytch,* 257 F.2d 475, 478–79 (3d Cir. 1958), in which the defendants fraudulently overstated costs and obtained overpayments from the Veterans Administration for operating a school in the years 1948–50. A counterclaim was filed for an amount due under a separate contract for 1951. This amount was conceded by the government. It was applied as a credit after damages for false claims under the 1948–50 contracts were doubled. The distinction is obvious. A credit on an unrelated second contract may be applied in reduction of the defendants' total indebtedness, but it has no relation to the amount of damages due on the first claim. Payments made in reduction of the loss on the first claim, however, are an essential part of the proof of the amount of damages. The determination of the amount of damage must be made before it is doubled. In the instant case the claim against Model was for the same loss as is asserted against

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United. The district court correctly followed *Klein* rather than *Sytch*. The only actual damage proved by the government was ten cents a tube.

One other aspect of the damage equation which the district court did not take into account was the actual value of the nonconforming tubes. These are still in the government's possession, and have a commercial market value, according to the stipulation, of between $15.00 and $17.50 a tube. United urged the district court that this value must be taken into account. United did not, however, appeal from that part of the judgment awarding the government $79.40 in damages. If we had accepted either of the government's contentions as to the calculation of damages the amount of any credit for the commercial market value of 397 tubes would be a significant issue. We do not reach it because United does not contest the $79.40 award.

IV. UNITED'S APPEAL

United contends that the district court erred in assessing 35 forfeitures of $2,000 based on the fact that Model had presented 35 invoices to the United States. Each of these invoices included claims for payment of JAN type 4X150G tubes misbranded JAN by United. It did not, however, prepare the invoices or have any knowledge of the manner in which Model's claims for payment were presented. It knew, of course, that Model would seek payment from the United States. United urges that there should be (1) a single forfeiture because the tubes were supplied under a single government contract, or because it furnished the tubes under a single purchase order, or (2) three forfeitures, because it made only three shipments, issued only three invoices, and received only three payments from Model, or (3) eight forfeitures because the government made only eight payments, or (4) at most twenty-one forfeitures because only 21 fraudulently stamped packing lists and 21 false certificates of compliance were prepared. It argues that the number of invoices made out by Model was entirely fortuitous and unrelated to any activity by it. In the district court the government asserted at one time 38 forfeitures: one for each of the 35 Model invoices, one for the false branding of 397 tubes, one for affixing the facsimile "Eagle" stamp on 21 packing lists and one for the issuance of 21 false Certificates of Compliance. At an earlier time it asserted 30 forfeitures in the mistaken belief that there were 30 invoices from United to Model rather than three. On appeal the government is satisfied with 35 forfeitures.

United does not contend that the Act is inapplicable to a subcontractor who did not deal directly with the government. Such a contention is foreclosed by *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537 (1943) and *United States* v. *Rohleder*, 157 F. 2d 126 (3d Cir. 1946). Rather, it contends that the number of forfeitures must somehow be related to the incidence of fraud by it, rather than left to the fortuity that the prime contractor submitted thirty-five invoices rather than one.

The text of the statute gives little guidance. The text set forth at 31 U.S.C. § 231 is not an enacted codification. The original version appeared in Act of March 2, 1863, Ch. 67, 12 Stat. 696. Section 1 of that Act subjected military personnel to courtsmartial for presenting a false claim, and § 3 subjected persons not in the military to double damages and a $2,000 forfeiture. The double damage feature undoubtedly was included because § 3 of the Act provided for qui tam actions in which the private informant pursuing the claim on behalf of the United States received one

half of the recovery. *See United States ex rel. Marcus v. Hess, supra*; *Toepleman v. United States*, 263 F. 2d 697 (4th Cir.), *cert. denied*, 359 U.S. 989 (1959). In the Revised Statutes, which were enacted into positive law, the 1863 Act was replaced by § 5438, which subjected a person not in the military to a fine and imprisonment for presenting a false claim, § 3490, which subjected a person not in the military to double damages and a $2,000 forfeiture for committing an act prohibited by § 5438 and § 3493 which reenacted the qui tam provision of § 6 verbatim. Thus in the Revised Statutes the acts for which forfeitures under § 3490 could be imposed were those set forth in the criminal provisions of § 5438. The criminal provisions of § 5438 were amended by the Act of May 30, 1908, Ch. 255, 35 Stat. 555, and codified and reenacted as section 35 of the Criminal Code in Act of March 4, 1909, Ch. 321, § 35, 35 Stat. 1095–96. Section 35 of the Criminal Code was amended by the Act of Oct. 23, 1918, Ch. 194, 40 Stat. 1015–16, by Act of June 18, 1934, Ch. 587, 48 Stat. 996, and by the Act of April 4, 1938, Ch. 69, 52 Stat. 197. In the 1948 recodification of the Criminal Code § 35 was split into two sections, 18 U.S.C. § 287 (false claims) and 18 U.S.C. § 1001 (false statements) and reenacted into positive law. Sections 287 and 1001 of Title 18 remain today as recodified in 1948. The civil damage and forfeiture provisions of § 3490 of the Revised Statutes have remained unaltered since the enactment of that revision. The operative law today is § 3490 which reads:

> "Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty-eight, Title "CRIMES", shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with costs of suit; and such forfeiture and damages shall be sued for in the same suit." R.S. § 3490 (1878).

One might have thought that from the successive amendments of the criminal provision referred to the courts might have perceived a Congressional intention that the liability for forfeitures under § 3490 continue to be defined by those amendments. The Supreme Court has indicated otherwise, however. *See United States v. Neifert-White Co.*, 390 U.S. 228, 228 n.1 (1968); *Rainwater v. United States*, 356 U.S. 590, 590 n.1, 592 (1958). The acts for which forfeitures may be imposed under § 3490 are those which were prohibited by § 5438 of the Revised Statutes which as here relevant reads:

> "Every person [1] who makes or causes to be made, or presents or causes to be presented, for payment or approval . . . knowing such claim to be false . . . or [2] who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or [3] who enters into any agreement, combination, or conspiracy to defraud the government of the United States . . . by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim . . . shall be imprisoned at hard labor. . . ."

The statute defines additional offenses with respect to federal property not here relevant.[2] Three separate offenses possibly relevant to the instant case are set forth. These may be paraphrased as [1] making a false claim on the government either directly or through an agent, [2] making a false entry for the purpose of aiding in having the false claim paid, and [3] entering into a combination or conspiracy to obtain the allowance of any false claim.

The Supreme Court has addressed the issue of multiple forfeitures only once, and on that occasion not definitively. In *United States ex rel. Marcus* v. *Hess, supra*, the defendants' chief attacks on the forfeiture judgment were that it violated the double jeopardy clause of the fifth amendment and that the qui tam

[2] "Every person who . . having charge, possession, custody, or control of any money or other public property used or to be used in the military or naval service, who, with intent to defraud the United States or willfully to conceal such money or other property, delivers or causes to be delivered, to any other person having authority to receive the same, any amount of such money or other property less than that for which he received a certificate or took a receipt, and every person authorized to make or deliver any certificate, voucher, receipt, or other paper certifying the receipt of arms, ammunition, provisions, clothing, or other property so used or to be used, who makes or delivers the same to any other person without a full knowledge of the truth of the facts stated therein, and with intent to defraud the United States, and every person who knowingly purchases or receives in pledge for any obligation or indebtedness from any soldier, officer, sailor, or other person called into or employed in the military or naval service any arms, equipments, ammunition, clothes, military stores, or other public property such soldier, sailor, officer, or other person not having the lawful right to pledge or sell the same, every person so offending in any of the matters set forth in this section shall be imprisoned at hard labor . . . ." R.S. § 5438.

provisions of R.S. § 3493 since repealed[3] were unlawful. The informer, Marcus, and the Attorney General were the petitioners for certiorari. After concluding that the judgment of this court, which had reversed the district court judgment imposing forfeitures, should be reversed, Justice Black wrote:

> "Section 3490 requires that the $2,000 forfeit be paid for doing 'any' of the acts prohibited by § 5438. Before the District Court, petitioner contended that this sum should be exacted for every form submitted by respondents in the course of their enterprise, while respondents argued that there should be merely one $2,000 sum collected for all the acts done. The District Court concluded that the lump sum in damages should be assessed for each separate P.W.A. project. Petitioner does not object to this decision and we conclude that under the circumstances of this case each project can properly be counted separately. The incidence of the fraud on each additional project is as clearly individualized as is the theft of mail from separate bags in a post office [citations omitted]. . . ." 317 U.S. at 552.

The context of the quoted language was a case in which the fraud was a collusive bid rigging conspiracy in the Pittsburgh area which operated with respect to 56 contracts with local government units financed by the Federal Public Works Administration. The district court had assessed fifty-six $2,000 penalties, which Justice Black refers to as "the lump sum" in damages. 317 U.S. at 552. The informer had contended in the district court that each false affidavit or certificate that was submitted to the P.W.A. administrator would be grounds for a separate $2,000 forfeiture. The defendants had contended that since there was a single ongoing conspiracy, only one forfeiture

[3] Act of Dec. 23, 1943, Ch. 377, § 2, 57 Stat. 609.

Hess, supra, rejected the government's contention, writing:

> "The government argues that in Hess the fraud was in the procurement of the contracts whereas in the situation confronting us the fraud arises from the means taken to obtain the approval of the Supervisor of Shipbuilding. That difference does exist but is not enough to avoid the impact of the Hess opinion. There the Supreme Court said 317 U.S. at page 552, 63 S.Ct. at page 388, 87 L.Ed. 443: 'The incidence of fraud on each additional project is as clearly individualized as is the theft of mail from separate bags in a post office.' Nor do we think that it can be fairly substantiated that the District Court in limiting the forfeiture to the sixteen contracts overlooked the second and third clauses of Section 6438. The fraud was committed with respect to the contracts. The purchase orders were part of those contracts and not definite projects in themselves. They are analogous to the great number of spurious forms in the Hess case which were absorbed into their respective projects. The grouping by the Trial Judge of the ninety purchase orders under their respective contracts generally corresponds to the distinctions made in United States ex rel. Marcus v. Hess, supra. It is reasonable and has a sound basis in the record." 157 F. 2d at 131.

United takes comfort from the *Hess* and *Rohleder* cases, suggesting that *Hess* would permit only one forfeiture since there was only one government project, and that *Rohleder* would permit only one forfeiture since there was only one purchase order from Model to United.

The district court did not choose to follow United's interpretation of *Hess* and *Rohleder*. Instead it followed *United States* v. *Ueber*, 299 F. 2d 310 (6th Cir. 1962). In that case a subcontractor submitted 442

was permitted. The district court had concluded that a bid rigging conspiracy prohibited by the third clause of § 5438 had affected 56 government-financed contracts. *See United States ex rel. Marcus* v. *Hess,* 41 F. Supp. 197, 216 (W.D.Pa. 1941). Since the petitioners for certiorari had before reaching the Supreme Court abandoned the contention that there could be a separate forfeiture for each false entry (the second clause of § 5438) the Court's holding deals only with the propriety of assessing a forfeiture under the conspiracy clause for each contract affected by a bid rigging conspiracy. Justice Black might have found a violation or violations of the third (conspiracy) clause of § 5438. Instead, possibly with the intention of narrowing the construction of § 3490, he said that the first clause governed. 317 U.S. at 540, n.2.

Three years after the *Hess* decision an issue of the appropriate number of forfeitures was before this court in *United States* v. *Rohleder,* 157 F.2d 126 (3d Cir. 1946). In that case Cramp Shipbuilding Company had a contract with the Navy to erect emergency plant facilities. Cramp had authority to subcontract subject to approval in advance by the Navy's Supervisor of Shipbuilding of all plans, prices, subcontractors and subcontracts. As work was completed Cramp would present a Final Cost Certificate and would be reimbursed monthly. Cramp entered into sixteen subcontracts with Rohleder on a cost-plus-fixed-fee basis. The Navy required that for approval of purchase of materials three or more vendors bids and prices be submitted. In ninety instances Rohleder submitted two fictitious bids along with that of the actual single vendor. The district court assessed sixteen penalties. On its cross-appeal the government contended that there should have been ninety forfeitures. This court, purporting to follow *United States ex rel. Marcus* v.

false invoices to the main subcontractor who in turn submitted 54 invoices to the United States. The court approved the imposition of 54 forfeitures based on those 54 invoices. Arguably the *Ueber* court was quite correct in determining that 54 forfeitures were permitted.[4] The violation was that set forth in the first clause of § 5438. The defendant subcontractor had knowingly caused to be made and presented for payment by the contractor a false claim. *Ueber* is not inconsistent with *Hess* for the holding in *Hess* did not depend upon the first clause of § 5438, but rather by the third clause. It must be noted that each of these clauses defines a separate crime involving different elements.

Ueber, and the district court decision in this case, however, is inconsistent with the language quoted above from *Rohleder*. *Rohleder* was not a conspiracy. It was, like the *Ueber* case, an instance of a subcontractor causing a contractor to submit a false claim. However, this court in *Rohleder* perceived in *Hess* an intention to give § 3490 a narrow and reasonable construction. If literally applied the section would permit a separate $2000 forfeiture under clause [1] of § 5438 for each invoice submitted by the main contractor (in this case 35); a separate $2000 forfeiture under clause [2] of § 5438 for each false entry (in this case 439); and a separate forfeiture under clause [3] of § 5438 for each conspiracy (in this case at least one). We may well question whether as so construed the statute would not compel the conclusion that it was penal rather than civil. That, of course, was the chief ground for appeal asserted in the *Hess* case, and

[4] *See also* United States v. National Wholesalers, 236 F. 2d 944 (9th Cir. 1956) (8 vouchers, 8 forfeitures), *cert. denied*, 353 U.S. 930 (1957); Faulk v. United States, 198 F. 2d 169 (5th Cir. 1952) (5 vouchers, 5 forfeitures).

probably was the reason for Justice Black's narrowing construction. This being so we continue to adhere to the interpretation of § 3490 announced in *Rohleder*. That interpretation focuses upon conduct of the defendants rather than upon the fortuity of the number of invoices submitted by the main contractor. Consistent with *Rohleder* there should under the first clause of § 5438 have been a single forfeiture since the defendants' fraud affected the performance of a single purchase order from Model to Union.

We note that there is a possible overlap between the offenses defined in the first and second clauses of § 5438 in that the means taken by a subcontractor to cause a contractor to make a false claim may, as was the case here, involve making false entries. But just as in *United States ex rel. Marcus* v. *Hess*, *supra*, the petitioners before the Supreme Court abandoned any contention for forfeitures in excess of 56, the government here has not pressed for more than 35 forfeitures. Thus we need not in this case consider whether on a single transaction a separate § 3490 forfeiture may be imposed by virtue of a violation of the first and the second clauses of § 5438.

We recognize that by our continued adherence to *Rohleder* we have continued a conflict in our interpretation of § 3490 and that of the Sixth Circuit in *Ueber*. Perhaps the Supreme Court will shed more light than we have been able to. Any limiting interpretation of § 3490 involves arbitrary line drawing. This statute, we may add, cries out for congressional attention.

The judgment will be affirmed with respect to double damages in the amount of $79.40 and with respect to the award of a single forfeiture in the amount of $2,000. The judgment awarding forfeitures in excess of $2,000 will be vacated.

APPENDIX B

United States Court of Appeals for the Third Circuit

Nos. 73-1885/73-1887

UNITED STATES OF AMERICA

v.

PHILIP L. BORNSTEIN, GERALD PAGE AND UNITED NATIONAL LABS, DIVISION OF SONORA ELECTRONICS, INC.

PHILIP L. BORNSTEIN, APPELLANT IN No. 73-1885
UNITED STATES OF AMERICA, APPELLANT IN No. 73-1886
GERALD PAGE, APPELLANT IN No. 73-1887

[D.C. Civil Action No. 1141-67]

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present: SEITZ, *Chief Judge* and VAN DUSEN and GIBBON, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered July 12, 1973, be, and the same is hereby affirmed with respect to double

damages in the amount of $79.40 and the award of a single forfeiture in the amount of $2,000.00. The judgment of the District Court awarding forfeitures in excess of $2,000.00 will be vacated.

Attest:

Clerk.

SEPTEMBER 4, 1974.

APPENDIX C

United States District Court District of New Jersey

Civil Action No. 1141–67

OPINION

UNITED STATES OF AMERICA, PLAINTIFF,

v.

PHILIP L. BORNSTEIN, GERALD PAGE, AND UNITED NATIONAL LABS, DIVISION OF SONORA ELECTRONICS, INC., DEFENDANTS.

KITCHEN: DJ:

The United States brings this civil action pursuant to the provisions of the False Claims Act (Act), 31 U.S.C.A. § 231, *et seq.*, to recover forfeitures and double damages provided for in section 231. Jurisdiction is founded in 31 U.S.C.A. § 232. The matter is before this Court on a stipulation of facts, trial memoranda of law, and oral argument of counsel. Findings of the Court are based on that stipulation.

Defendant United National Labs (United), a corporation of the State of New Jersey, was engaged in the business of purchase and sale of electron tubes. Defendant Bornstein was part owner and general manager of United; defendant Page was part owner, vice-president, and manager of sales of that corporation. At all times relevant to this proceeding United was operated and managed by Bornstein and Page.

In August 1962 the United States Signal Supply Agency entered into Supply Contract No. DA–36–039–AMC–01080(E) with Model Engineering and Manu-

facturing Corp., Inc. (Model), a corporation of the State of Indiana. Model was engaged in manufacturing and building electronic radio equipment and radio sets, and under the contract was to supply radio kit sets [1] to the Department of the Army. The component parts list of this contract specified that Sub-item #1–5–33, to be included in the radio accessory kits, called for:

2 ea. Tube, Electron JAN type
4X150G Per Specifications, MIL.
E–1 and TSS MIL. E–1, 302E
dated 4/17/57 [2]

[1] Each radio kit set was to contain the following: Radio transmitter kit; radio receiver kit; power supply kit; radio transformer kit; and a radio accessory kit. The total dollar volume of the contract was $2,096,583.08.

[2] The specifications regarding this particular JAN type tube provided as follows:

3.7.1.1 "JAN" prefix. The designation of all tubes procured under this specification shall bear the prefix "JAN" except that in the case of small tubes (T-6½ bulb outline or smaller) the prefix "J" shall be used. Tubes procured under a contract which either permits or requires any changes in any of the conditions or requirements of this specification shall not bear the prefix "JAN" nor any abbreviation thereof. The "JAN" brand is registered under number 504860 by the United States Patent Office and shall be used only on tubes which have passed Government inspection.

3.7.1.2 Qualification code. The qualification code marking follows the "JAN" prefix. This designation is assigned to the manufacturer for use on all tube types of his manufacture which has passed the qualification tests and have been approved for inclusion on the Qualified Products List. The code-designating letters shall be as listed in Publication NAVSHIPS 900,152. The code-designation shall be used only by the manufacturer to whom it has been assigned and only as a part of the designation on tubes manufactured at the plant to which the qualification approval was granted. In the case of small tubes (see 3.7.1.1), the manufacturer's code designation may be abbreviated by deleting "C" (the indication that the code has been

Continued

JAN 4X150G electron tubes are manufactured only for use in military equipment. Surplus or obsolete JAN 4X150 G tubes may be used commercially even though they were originally manufactured for military use. During all times relevant to this proceeding the only authorized manufacturer of JAN 4X150G tubes was Eitel McCullough, Inc. (Eimac), a corporation of the State of California.[3] Eimac's qualification code,[4] which appeared on all tubes of its origin that had passed certain qualification tests, was CIM. In addition to the branding of JAN–CIM on tubes that passed all of the tests, Eimac imprinted an acceptance code date on each tube. This code date was a four digit number reflecting the year and week of manufacture.

Due to the requirements of the equipment specifications and "JAN" tests the use of non-"JAN" branded commercial tube or a surplus or obsolete "JAN" branded tube required prior written approval from the Government contracting officer who admin-

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Continued
assigned to a commercial organization in the United States or Canada).

3.7.1.2.1. Tubes not having qualification. Tubes procured under this specification from a source of supply for which no qualification approval has been granted, shall be marked "JAN" followed by the type on the side wall of the base, or on the envelope of metal, loc-in tubes, or other glass tubes, or on the bulb of tubes without bases. The prefix "J", abbreviation for "JAN", shall be used only as specified in 3.7.1.1. The manufacturer's code name which signifies qualification shall not be used on any part of the tube.

[3] Tubes can be "JAN" branded by the manufacturer only after they have passed Government inspection at the place of manufacture during the manufacturing process. As proof of Government source inspection the inspector imprints his "Eagle" acceptance stamp on the packing lists accompanying each shipment of tubes. In addition the inspector affixes his signature to a written certification that the tubes have been source inspected and passed all the required tests.

[4] See § 3.7.1.2 of note 3 *supra*.

istered the contract. Model had not obtained such approval and, in fact, certified that the material offered was new, recently manufactured, had never been used, and was not former surplus of any type.

In May 1963 defendant Page wrote Model advising that United was able to supply JAN 4X150G electron tubes at a price of $32.00 per tube.[5] In that same correspondence Page assured Model that United would test the tubes according to the applicable military specifications and would certify the tubes by Government inspection. Defendants knew that the tubes were for use in the Government contract, even though they had never seen a copy of that agreement.

Pursuant to the above arrangement in July 1963 defendants shipped ten 4X150G tubes to Model for sampling. Following a preliminary inspection of the sample tubes, Model sent a form to United advising of the following facts concerning the tubes:

no code date
no JAN marking
electrically OK
physically OK
Decision: accepted

In December 1963 Model issued to United a purchase order for 1008 JAN 4X150G electron tubes at a total cost of $32,256.00 and a unit price of $32.00 per tube. Shortly thereafter United shipped 120 of the subject tubes to Model. In early January 1964, however, Model returned the tubes as unacceptable because they had not been JAN branded or Government source inspected.

Model then became concerned that United might not be able to furnish tubes that met Government specifications and requested United confirm that the

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[5] In 1963 non-obsolete JAN 4X150G tubes had a market price of $40.00 per tube.

correct tubes could be furnished. By letter of January 24, 1964, signed by defendant Bornstein, Model was advised as follows:

> This letter is to stand as affirmation by us that we are fully equipped and capable to delivery (sic) any and all electron tubes and semi-conductors on which we accept purchase orders from you to the applicable military specifications and government source inspection supplied as required.

The defendants then affixed or caused to be affixed to the tubes in their possession in January 1964 [6] the following markings:

(1) The JAN designation;
(2) The manufacturer's qualification code (CIM); and
(3) The acceptance date (6318).

The defendants knew these markings were false and inaccurate. Before shipping the falsely branded tubes to Model, defendants sent the tubes to Saxon Laboratories, Inc. in New York for a MIL. E-1 electrical test. After the test was completed and the tubes were found operable, a facsimile of a Government inspector's "Eagle" stamp was affixed to each of the defendants' packing lists accompanying the shipments to Model.[7] This stamping was accomplished at Saxon

[6] United purchased 380 tubes from Arthur H. Richardson, Inc. at a price of $17.50 per tube. Arthur H. Richardson, Inc. was a franchised distributor of Eimac and had purchased 451 tubes, which had been placed in termination inventory due to a design change, for a price of $15.52 per tube.

[7] These packing lists did not, however, contain the Government inspector's written certification that the tubes had been source inspected and had passed all the required tests. See note 4 *supra*.

Laboratories by someone other than defendants Page and Bornstein.

There were twenty-one packing lists covering the tubes and containing their serial numbers.[8] The packing lists comprised three separate shipments to Model. Accompanying each shipment was a "Certificate of Compliance" signed by defendant Page as vice-president of United. The certificate stated as follows:

> It is hereby certified that all materials used in the manufacture of parts in the quantity called for on the subject purchase order received by Model . . . conform to the material and/or manufacturing specifications as called for on said purchase order.
>
> Physical, Electrical, and/or Chemical test reports are on file with us or with our suppliers for examination and indicate conformance with applicable specification requirements.

United billed Model on three separate invoices and was paid $32.00 per tube by Model.

The United States received 684 4X150G tubes from Model under the contract. Of this total number of tubes 442 were found to contain:

(1) A false JAN designation;
(2) A false manufacturer's qualification code (CIM); and
(3) A false acceptance date (6318).

These falsely branded tubes were removed from the radio kits purchased from Model. Only 397 of these tubes can be identified by serial number as having been supplied by defendants. Serial numbers for the remaining forty-five improperly branded tubes are unknown and cannot be directly traced to defendants.

[8] One additional United packing list was found in Model's possession in July 1954, however, this list does not reference the contract number and does not refer to any tubes by serial number.

Model submitted to the United States thirty-five claims for payment under the contract. These claims were designated as invoices. Each invoice included claims for payment for tubes that had been "JAN" branded by the defendants although defendants did not prepare any of Model's invoices or have knowledge of the manner in which claims were presented to the Government. Model's thirty-five claims were paid with eight Government vouchers. The cost to the United States to replace the falsely branded tubes was $40.82 per tube.[9]

In May 1966 defendants Bornstein and Page pleaded guilty to Count II of an indictment which charged that from January 24, 1964, through June 3, 1964, they conspired to cause to be submitted to an agency of the United States false statements and representations to material facts and conspired to possess forged documents enabling Model to obtain money from the United States. Defendants were each given a suspended sentence and placed on probation for two years. Neither defendant was fined. In December 1966

[9] The stipulation submitted to this Court stated as follows:

> 17.(o) The cost to the United States in replacing the 442 falsely marked 4X150G electron tubes was $40.82 per tube or a total of $18,042.44 *which is subject to proof by affidavit or voucher.* (Emphasis added)

Approximately one month after the stipulation was received the United States Attorney submitted documentation, which technically was not an "affidavit or voucher," showing, *inter alia*, that the per tube cost of replacement was $40.82. Counsel for defendants strenuously object to our receipt of this documentation and a subsequent affidavit submitted under cover of June 4, 1973. We accept this documentation for the sole purpose of meeting the Government's required standard of proof on the issue of replacement cost. Extraneous facts contained in these additional Government documents in no way alter the stipulation. Defendants' motion to strike the Government's claim for actual damages, which motion was made at oral argument, is therefore denied.

Model paid the United States $18,000.00 in settlement of a claim brought against Model for the 442 falsely branded tubes.

The legal issues which confront the Court are as follows: did the defendants violate the False Claims Act; if the Court finds that the Act was violated, what actual damages, if any, were suffered and how are they to be computed; and, how is the number of forfeitures to be computed.

I. STATUTORY VIOLATION

The applicable section of the False Claims Act, 31 U.S.C.A. § 231, provides, in pertinent part:

> Any person . . . [1] who shall . . . cause to be made . . . or cause to be presented, for payment or approval, to . . . any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department . . . thereof, knowing such claim to be false, fictitious, or fraudulent, [2] or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any . . . voucher . . . claim, certificate, affidavit . . . knowing the same to contain any fraudulent or fictitious statement . . . [3] or who enters into any agreement . . . or conspiracy to defraud . . . the United States, or any department . . . thereof, by obtaining or aiding to obtain the payment . . . of any false or fraudulent claim . . . shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act. . . .

Applying the findings of this Court to the above quoted statutory language, it is an inescapable conclusion that defendants Bornstein and Page violated the

provisions of section 231 of the Act. Defendants knew the materials they were furnishing Model were for use in a Government contract. They were also aware that their initial shipment of 120 tubes was unacceptable because the tubes lacked the required "JAN" brands. By knowingly affixing or causing to be affixed false markings on the tubes and by certifying that all materials furnished conformed to the applicable specifications, defendants caused Model to present thirty-five claims for payment to the United States. Each claim included a request for payment on behalf of some falsely branded tubes. The defendants, therefore, knew that the portion of Model's claims for payment which encompassed the falsely branded tubes would be fraudulent. This constitutes a clear violation of "clause one" of section 231 of the Act.

By submitting to Model vouchers and certificates containing statements defendants knew were fraudulent, Bornstein and Page aided Model in obtaining payment for fraudulent claims. This is a violation of "clause 2" of section 231 of the Act. Finally it has been established by clear and convincing proof that defendants agreed or conspired to aid to obtain the payment of fraudulent claims, thereby violating "clause 3" of section 231 of the Act. The evidence that convinces the Court of the existence of this agreement or conspiracy is as follows: After having been notified that the tubes were unacceptable for lack of "JAN" markings, each defendant, on at least one occasion, either certified or stated to Model that materials furnished by United pursuant to Model's purchase order would meet the applicable Government specifications; defendants admitted either affixing or causing to be affixed the false "JAN" markings; and defendants pleaded guilty to Count II of an indictment charging them with conspiracy.

It is immaterial that defendants did not deal directly with the Government. That they were one step removed from direct contact with the Signal Supply Agency does not vitiate or diminish their liability. In *United States ex rel. Marcus* v. *Hess,* 317 U.S. 537 (1943), the Court stated that the provisions of the Act "indicate a purpose to reach any person who knowingly assisted in causing the government to pay claims which were grounded in fraud, without regard to whether that person had direct contractual relations with the government." *Id.* at 544–45. In that case the Court held the Act applicable to contractors who, by collusive bidding, obtained contracts with municipalities and school districts of a state for work on federal Public Works Administration projects. The contractors were paid for their work with federal funds even though actual payments were made in the names of the local authorities.

The Court of Appeals for the Third Circuit has ruled, on at least two occasions, that the wrongdoer need not be in a direct contractual relationship with the Government in order to be liable for false claims under the Act. In *United States* v. *Rohleder,* 157 F. 2d 126 (3d Cir. 1946), defendant Rohleder had entered into sixteen subcontractors with the Cramp Shipbuilding Company pursuant to a contract between Cramp and the Navy to complete certain shipyard improvements. The scheme for which Rohleder was found liable under the Act involved collusive bidding on items included in work under the subcontracts. Since the fraud was committed with respect to the subcontracts, Rohleder was held liable for sixteen $2,000 forfeitures. *Id.* at 131. *Accord, United States* v. *Veneziale,* 268 F. 2d 504, 505 (3d Cir. 1959); *see United States* v. *Ueber,* 299 F. 2d 310 (6th Cir.), *aff'd following remand for further findings of fact,* 303 F. 2d 462 (6th

Cir. 1962); *Murray & Sorenson, Inc.* v. *United States*, 207 F. 2d 119 (1st Cir. 1953).

II. ACTUAL DAMAGES SUFFERED

Although the Government removed 442 falsely branded 4X150G tubes from the radio kit sets supplied by Model, the proofs show that only 397 of these tubes can be traced by serial number as having originated with defendants. Notwithstanding the similarity between the markings on these 397 tubes and those on the remaining forty-five tubes not identified by serial number, this Court is not persuaded that defendants are liable for these latter tubes. This is particularly so in light of the fact that a total of 684 4X150G tubes were received from Model and there has been no showing that United was the sole supplier of 4X150G tubes.

The Government has established that the per unit cost to replace the tubes was $40.82. Since defendants were liable for only 397 falsely branded tubes, the total amount of actual damages attributable to them is $16,205.54. Whether the falsely branded tubes have absolutely no value to the Government and therefore warrant no application of credit to defendants on their behalf is an issue over which the litigants are diametrically opposed. The parties do agree, however, that the rule of law to be applied in determining the amount of actual damages was stated in *United States* v. *Ben Grunstein & Sons, Co.*, 137 F. Supp. 197 (D.N.J. 1955).

The essence of the fraudulent scheme in that case involved circumvention of the meat inspection system of the United States Army. Defendants in *Ben Grunstein* were charged with knowingly supplying substandard meats to the Army. After disposing of a discovery matter, the court entered a supplemental

opinion dealing with the measure of damages to be applied in that case. The court cited *Marcus* as specifically rejecting the application of the so-called "out-of-pocket" rule of damages in a False Claims Act proceeding. In fact, the court in *Ben Grunstein* felt that the Supreme Court in *Marcus* had applied what is called the "benefit-of-the-bargain" rule of damages. The court in *Ben Grunstein* stated as follows:

> [The "benefit-of-the-bargain" rule,] in a case where the fraud is as to the goods received by the person defrauded . . . is the difference between the value of what plaintiff would have received, but for the fraud, and the value of what he did receive in fact, due to the fraud. This might be more simply stated as being the value of the property which the person defrauded would have received but for the fraud, less, as a credit, the value of the property which he has in fact received. *United States* v. *Ben Grunstein & Sons, Co., supra* at 205.

The court adopted the "benefit-of-the-bargain" rule holding that the just measure of actual damages plaintiff had sustained was the value of the meat defendant was under contract to deliver less the value of the meat in fact delivered. *Id.* at 210.

In the case *sub judice* the value of the goods the Government should have received but for defendants' fraud is analogous to the per tube cost of replacing the tubes supplied by defendants. As previously stated that sum is $16,205.54. The Government contends that since no permission to supply other than "JAN" branded tubes was given to Model the entire lot of falsely branded tubes had absolutely no value. Therefore no credit should be applied to lessen the amount of actual damages suffered. Defendants, of course, take issue with this contention.

Defendants argue that although the tubes did not

meet the required specifications they did have value, at least to the defendants, and were never returned by the Government. At the very minimum, defendants continue, they should be given credit for the per unit price of $15.52 paid by Arthur H. Richardson, Inc.[10] It could also be argued that the value of the tubes actually furnished should be computed by utilizing either the per unit price of $17.50 paid by United or the per unit price of $32.00 paid by Model. The issue need not be decided on this basis, however, because the $18,000.00 settlement paid by Model must be considered, and when this is done the actual value of the falsely branded tubes, for purposes of determining actual damages, becomes moot.

The Government advances two arguments concerning application of the $18,000.00 settlement as a credit on behalf of defendants. First, the Government argues that no portion of Model's settlement can be used as a credit applied against the actual damages caused by Bornstein and Page. Secondly, if the Court decides that defendants are entitled to credit, then it may be applied only after doubling the actual damages of $18,042.44. This Court rejects both these arguments for the reasons below.

With respect to the denial of credit altogether, the Government's argument is basically that the $18,000.00 settlement came from a source collateral to defendants and, therefore, should not inure to their benefit. The Government supports this argument by directing the Court's attention to the "collateral source rule" and to *United States* v. *Klein,* 230 F. Supp. 426 (W.D. Pa. 1964), *aff'd,* 356 F. 2d 983 (3d Cir. 1966).

The "collateral source rule" is a tort concept which allows a plaintiff to recover full damages from a defendant who is liable for the injury, notwithstanding

[10] See note 7 *supra.*

the fact that plaintiff has already been paid his salary or pension during disability, or had his medical expenses paid by another, or out of the proceeds of an accident insurance policy. In this case plaintiff may receive double payment for the same items. The defendant wrongdoer, however, does not get the benefit of payments that plaintiff receives from a collateral source. 3 F. HARPER & F. JAMES, THE LAW OF TORTS, § 25.22, at 1343–44 (1956). The key to the application of this rule, which denies credit to the wrongdoer, is a determination that the source of the benefit to plaintiff is truly collateral to the wrongdoer. In the case *sub judice* Model and United were contracting parties, and it is clear that in any action brought against Model on the main Government contract, United could have been joined as a third party if the goods it furnished were alleged to have been the cause of the breach of the main contract. That Model chose not to pursue United when the Government brought its claim against Model does not adversely affect this Court's finding that Model's actions in settling the claim were at least partially motivated by the actions of defendants. In this respect at least the settlement was not truly collateral and will not operate to bar application of a credit on defendants' behalf.

United States v. *Klein, supra,* is not apposite. In that case defendants had procured fraudulent mortgage loan applications to induce the Veterans Administration to issue loan guarantees to veterans who were supposedly living in the houses. After the loans went into default, foreclosure proceedings were instituted. The court refused to credit to defendant Klein a $60,000.00 payment that the Government had collected on account of its claim against First Federal Savings & Loan Association of Greene County. First Federal had participated in the scheme to procure

Veterans Administration approval for the loans. The court refused to apply the credit, not solely because Klein was a non-contributing defendant, but because the evidence was incompetent to show who paid the $60,000.00 or for what reason it was paid. The court stated as follows:

> We know that a number of others were involved in the Bretz deals as participants. We don't know what the involvements were. We don't know what claims, if any, there were and against whom. No evidence was introduced that First Federal paid any money, nor was there any evidence of why the $60,000.00 was paid. To make a deduction here that it was basically and totally on account of the Klein claim is pure speculation. 230 F. Supp. at 443.

This Court cannot say that the result would have been the same if defendant had carried his evidential burden.

Klein is also of assistance in rejecting the Government's contention that if we are to apply a credit then it should be applied only after doubling the figure of $18,042.44. This very issue was raised by the defendant in *Klein*. The court stated as follows:

> Certain credit amounts were received by the plaintiff after foreclosures of the properties. The Government urges that damages should be first doubled and that allowable credits should be deducted from the double damages. The defendant disagrees. The Act provides that in addition to the $2,000 forfeiture, the plaintiff is to be allowed double the amount of damages which it may have sustained. The Act does not indicate when damages are to be doubled, it merely provides for double the amount of damages, and this reasonably appears to be such as are finally determined.
>
> Accordingly, *the credit should be first deducted from the single damages as finally determined and the remainder doubled* for the purpose of determining the amount of damages to which the plaintiff was entitled. [Emphasis Added]. *Id.*

Having determined that the $18,000.00 settlement should inure to defendants' benefit and be deducted from the single damages, the Court must now consider the computation of actual damages. Since Model paid $18,000.00 for 442 falsely branded tubes, the per tube value of that settlement was $40.72. The value of the 397 tubes attributable to defendants was $16,165.84, and the value of what the Government should have received on behalf of defendants was $16,205.54. Single damages, therefore, are $39.70, doubled $79.40.

III. FORFEITURES

The Government contends that thirty-eight $2,000 forfeitures should be assessed for violations of the Act committed and caused to be committed by the fraudulent acts of defendants. Those forfeitures are as follows: One forfeiture of defendants' twenty-one false "Certificates of Compliance" issued to Model; one forfeiture for causing a facsimile of a Government source inspector's "Eagle" acceptance stamp to be imprinted upon each of defendants' twenty-one packing lists; one forfeiture for acquiring surplus 4X150G tubes and "JAN" branding them; thirty-five forfeitures for causing Model to present to the United States thirty-five separate fraudulent claims for payment. Defendants, on the other hand, argue that the maximum number of forfeitures that possibly can be imposed are three, one for each of the three shipments to Model, and that this Court should impose only one forfeiture for the one contract between United and Model.

The Court rejects outright the Government's claim for the three individual forfeitures. First, there has been no evidence establishing that defendants issued *twenty-one* false "Certificates of Compliance" to Model. Secondly, there has been no evidence that defendants caused the "Eagle" acceptance stamp to be imprinted on their packing lists. Thirdly, since the Act proscribes the submission of fraudulent claims for payment to the United States, the Court does not reach the question whether falsely branding the tubes in and of itself constitutes a violation of the Act. Accordingly, the litigants' remaining contentions must be considered.

Courts have consistently applied the Act's forfeiture section to impose various numbers of forfeitures for individualized acts occurring within a single continuing course of conduct. *E.g., United States ex rel. Marcus* v. *Hess, supra; United States* v. *Ueber, supra; United States* v. *Rohleder, supra.* It is also clear, as the Court has previously noted, that a person may be held liable under the Act even though the fraudulent claims presented to the United States were not submitted by him. Typically the false claim is submitted by a main contractor who has been caused to submit a false claim through the fraudulent acts of a subcontractor. *E.g., United States ex rel Marcus* v. *Hess, supra; Murray & Sorenson, Inc.* v. *United States, supra,* at 123. There is no difficulty, therefore, in assessing the statutory forfeitures against defendants Bornstein and Page. The only problem is determining the correct number of forfeitures to be imposed.

In this respect *United States* v. *Ueber, supra,* is particularly instructive. In that case defendant Ueber was a subcontractor to two separate corporations which had prime contracts with the Government.

Each of Ueber's subcontracts provided fixed hourly rates for "direct labor" furnished pursuant to the subcontracts. Furthermore, the payments for "direct labor" were to be in lieu of all other charges, including overhead. The complaint charged that during a six month period Ueber had charged as direct labor the time of three of its employees which actually was overhead or "indirect labor." Ueber had presented a total of 422 invoices to the prime contractors containing such charges. In turn the two prime contractors had presented a total of fifty-four vouchers to the United States. Each of these vouchers represented a claim for payment based on at least some of the 422 invoices submitted by Ueber. The district judge assessed a $2,000 forfeiture for each of the fifty-four vouchers submitted through the two prime contractors for a total of $108,000.00 in forfeitures. 299 F. 2d at 312.

On appeal Ueber contended that the assessment of fifty-four forfeitures based on the vouchers submitted by the prime contractors was error. He argued that only two forfeitures should have been assessed, one for each subcontract. The Court of Appeals for the Sixth Circuit rejected Ueber's argument stating:

> The conduct proscribed by § 231, as applicable here, consisted of acts of causing false claims to be presented to the government. Each voucher which Ueber caused to be submitted through [the prime contractors] was a separate act justifying an assessment of a separate forfeiture. . . . Plaintiff's complaint did not charge that the entering into subcontracts . . . in any way violated § 231. These contracts were valid. The vouchers submitted to the United States to obtain payments under such contracts made up the acts which offended the False Claims Act. [Citations Omitted]. *Id.* at 313.

As in *Ueber,* there is no charge that fraudulent conduct procured the contract between Model and United or that the contract itself violated section 231. The fraudulent acts in the present case occurred after the contract had been negotiated. Those acts caused Model to submit thirty-five false claims, each of which constituted a separate violation justifying a separate forfeiture.

United States ex rel Marcus v. *Hess* and *United States* v. *Rohleder* do not compel a different result and do not support defendants' alternative contentions that a minimum of one forfeiture, for the one contract between Model and United, and a maximum of three forfeitures, one for each shipment from United to Model, should be imposed. Both *Hess* and *Rohleder* involved collusive bidding schemes regarding public works projects and subcontracts respectively. Forfeitures were based on the number of projects in *Hess* and on the number of subcontracts in *Rohleder.* In those cases the incidence of the fraud was localized, in *Hess* on each of the projects, and in *Rohleder* on each of the subcontracts. In this case the incidence of the fraud was localized in the claims submitted by Model to the United States.

Accordingly counsel for the United States shall submit an order consistent with this opinion giving judgment for the United States in the amount of $70,079.40.

JOHN J. KITCHEN,
Judge, U.S. District Court.

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